

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

MAY -3 2007

COURT OF APPEALS  
DIVISION TWO

HEATHER G.,

Appellant,

v.

ARIZONA DEPARTMENT OF  
ECONOMIC SECURITY,  
GABRIEL A., RAFAEL M.-O., LILIANA  
M.-O., MARIE M.-O., and ANTONIO  
M.-O.,

Appellees.

2 CA-JV 2006-0056  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 162705

Honorable Deborah Bernini, Judge

AFFIRMED

Belinda B. BreMiller

Tucson  
Attorney for Appellant

Terry Goddard, Arizona Attorney General  
By Dawn R. Williams

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Heather G. appeals from the juvenile court's order terminating her parental rights to five children who ranged in age from nearly eight to fifteen at the time of the

severance hearing in October 2006. The court terminated Heather's rights on four grounds: abandonment; abuse or neglect; nine-month, out-of-home placement; and fifteen-month, out-of-home placement. *See* A.R.S. § 8-533(B)(1), (2), (8)(a), and (8)(b). She contends that the Arizona Department of Economic Security (the Department) failed to establish any of the statutory grounds beyond a reasonable doubt or that termination of her rights was in the children's best interests. She also contends the juvenile court abused its discretion in finding the Department had made reasonable efforts to reunify her Indian family. We affirm the order.

¶2 We will uphold a juvenile court's order severing a parent's rights if reasonable evidence supports the court's findings. *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). Because the children are eligible to be members of the Cherokee Nation, the Department's burden of proof was beyond a reasonable doubt. *See* Ariz. R. P. Juv. Ct. 66(C), 17B A.R.S. The juvenile court applied that burden of proof to each of its conclusions of law.

¶3 Because the mother failed to appear at the hearing on the dependency petition, the allegations in that petition were deemed to be true, and her six children were adjudicated dependent in late May 2004. The petition, filed in March 2004, alleged the children had been taken into temporary custody on March 2 based in part on a report to Child Protective Services that Heather had handcuffed and shackled her oldest daughter, Delaila, while two of her sons had restrained the girl on Heather's orders. Delaila still had scabs from the

incident two weeks later, and Heather admitted the incident had occurred. Delaila eventually ran away from her placement, and the dependency as to her was dismissed.

¶4 Four of the five other children were returned to Heather shortly after the dependency petition was filed. The whereabouts of the youngest, Antonio, were originally unknown, but after it was learned he was living in Mexico with his father, the court ordered Heather to return Antonio to Arizona within a week. Heather failed to comply with the order and left town with four of the children in May 2004. The court then held her in contempt of court and issued a warrant for her arrest.

¶5 The four children and their brother Antonio were finally located in Mexico in June 2005 where they had been living with Roque G., Heather's husband and the father of Marie and Antonio, until they escaped from his home and were placed in a Mexican orphanage. Roque had pleaded no contest in Texas in September 2003 to indecency to a child younger than seventeen for having sexual contact with Liliana. The Texas court deferred entering a conviction and placed Roque on probation for ten years. Among his probation conditions were requirements that he not have any contact with Liliana or any other person under the age of seventeen. Heather knew about his no contest plea and probation conditions but believed her children were lying about the allegations of sexual abuse.

¶6 The children were returned to Arizona in August 2005. The case manager reported the children were thin and dirty, two had distended bellies, one had a chronic cough from a bronchial infection, and one had intestinal worms. Liliana, then ten years old,

had been repeatedly sexually abused by Roque, and all the children had been repeatedly beaten by him. All the boys displayed violent, aggressive behaviors. Three of the children said they frequently had not attended school in Mexico because Roque had required them to sell candy or treats or beg for money. And Gabriel told the case manager he had not seen their mother in a year, and they did not know where she was, a report later confirmed by the other children.

¶7 Pursuant to the court's order, the Department filed a motion in December 2005 to terminate Heather's rights to her children. Heather did not appear at the severance hearing, and the juvenile court deemed she was voluntarily absent and had thereby waived her right to a jury trial, which she had previously requested. Only the case manager and a child welfare specialist for the Cherokee Nation Indian Child Welfare Program testified at the hearing.

¶8 Heather first argues the Department failed to prove beyond a reasonable doubt the statutory ground of abandonment. She argues the juvenile court improperly found she had abandoned her children, asserting the evidence showed only that she had taken the children to Roque, was subsequently incarcerated, and was then prevented by court order from contacting her children.

“Abandonment” means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. § 8-531(1). Under that definition, “abandonment is measured not by a parent’s subjective intent, but by the parent’s conduct: the statute asks whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship.” *Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶ 18, 995 P.2d 682, 685-86 (2000).

¶9 The evidence showed Heather had fled from her apartment with four of the children in May 2004, shortly after she had been ordered to return Antonio to her home; took the children to Roque in Mexico; and left without them almost immediately, knowing Roque was prohibited from having contact with the children. The children apparently never saw their mother again. After the children were finally located in Mexico in June 2005, the case manager eventually learned that Heather was incarcerated in a federal prison in Texas. The records of her conviction show she was tried in April 2005 and sentenced in July 2005 to ten months in prison for having brought illegal aliens into the United States for private financial gain in late November 2004. Heather was released from prison in February 2006 and moved to El Paso to serve her three years of supervised release.

¶10 Heather contends the evidence that she “took the children to the Father and subsequently was incarcerated” and that she “was prevented by court order from contacting the children” constituted just cause for her failure to contact her children and precluded the juvenile court from finding she had abandoned them. But Heather has mischaracterized the evidence.

¶11 First, Roque is the father of only the two youngest children; accordingly, Heather had no basis to leave the three older children with him. Second, she left the children with Roque in May 2004 but did not commit her offense until November 2004, a period equal to the six months that constitutes prima facie evidence of abandonment in § 8-531(1). And, third, the court order to which she refers did not absolutely prohibit her from having contact with her children. At a hearing held in August 2005, after the case manager had retrieved the children from the Mexican orphanage and placed them in foster homes in Tucson, the court suspended all visitation for the parents “until they appear in Court to explain the recent events.” Heather did not do so. As a result, in October 2005, the court ordered that the children’s placement not allow Heather to have contact with her children. Moreover, Heather never requested permission to resume contact with her children, despite appearing telephonically at hearings between November 2005 and September 2006.

¶12 In addition, the case manager testified that Heather had never sent cards or letters for the children to her and had never sent any money for their support; she also testified the children’s grandmother, with whom they were placed in October 2005, had never reported Heather had sent the children cards or financially supported them. Contrary to Heather’s assertions, therefore, the evidence reasonably supports the juvenile court’s conclusion beyond a reasonable doubt that Heather abandoned her children without just cause even before she was incarcerated. And, because we find the evidence supports the court’s order on the ground of abandonment, we need not address Heather’s arguments that

the evidence was insufficient to support the other statutory grounds the court cited. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002).

¶13 Heather next challenges the juvenile court's conclusion that the Department had proved beyond a reasonable doubt it had made active efforts "to provide remedial services and rehabilitative programs designed to prevent the break-up of the family but that those efforts were unsuccessful." As Heather points out, that conclusion is a necessary one to sever a parent's rights to an Indian child. *See* 25 U.S.C.A. § 1912(d). Heather specifically complains that the Indian child welfare specialist's testimony "was somewhat contradictory in nature."

¶14 Heather is correct that the specialist testified she had no information on the case plan tasks Heather was assigned from the time she was incarcerated. But that testimony does not, as she asserts, mean the court's conclusion was unfounded.<sup>1</sup> It is undisputed that the court relieved the Department of its obligation to provide services to Heather in November 2005 while she was still incarcerated when the court changed the case plan to severance and adoption and ordered the Department to file a motion to terminate Heather's parental rights. Accordingly, Heather had no case plan tasks while she was incarcerated. And the record shows that the Department provided Heather a number of remedial services

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<sup>1</sup>Although Heather is correct that this court's decision orders are not expressly included in the rule prohibiting citation of memorandum decisions, it is clear from the language of another section of the rule that only opinions may be cited. *See* Ariz. R. Civ. App. P. 28(a), 17B A.R.S. (defining opinion, memorandum decision, order, and publication), Ariz. R. Civ. App. P. 28(c) (prohibiting citation of memorandum decisions); Ariz. R. P. Juv. Ct. 88(G), 17B A.R.S. (Rule 28, Ariz. R. Civ. App. P., applies to juvenile appeals). Accordingly, we do not address her reliance on an unpublished decision order.

during the two months before she absconded to Mexico. The evidence that Heather received services for only two months before she absconded with the children and that the Department was relieved of the obligation to provide her services while she was still incarcerated in Texas does not undermine the court's conclusion.

¶15 Finally, Heather asserts the Department failed to prove by clear and convincing evidence that termination of her parental rights was in the children's best interests. As the Department points out, our supreme court has held the best interests requirement in § 8-533(B) need be established only by a preponderance of the evidence. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). Heather concedes in her reply brief that she misspoke in her opening brief and asserts the burden of proof in an Indian child case is actually beyond a reasonable doubt. We need not resolve the issue, however, because the juvenile court based its finding on the higher burden of proof.

¶16 Heather claims no evidence was presented on the detriment the children would suffer if her rights were not severed, but the case manager's testimony about the children's best interests was replete with details of the contrast between their lives since they were placed with their grandmother and their lives when Heather abandoned them in Mexico to Roque's care. The case manager testified that severance of Heather's rights was in the best interests of each child, and the Indian child welfare specialist concurred, stating she believed the children "would be seriously damaged again" if they were returned to Heather. According to the case manager, both Gabriel and Rafael had told her they wanted nothing to do with their mother. She reported Liliana was "very hurt by what her mom did to her"



in leaving her with Roque. And, although Heather is correct that Liliana had expressed confusion about whether she wanted her mother's rights severed, the case manager explained Liliana was afraid to trust adults because she had been abandoned and molested by them and was thus not capable of knowing whether she wanted her grandmother to adopt her. But that confusion did not render the witnesses' opinions about Liliana's best interests insufficient to support the court's finding.

¶17 Having concluded reasonable evidence supports the juvenile court's order terminating Heather's parental rights to her five children, *see Jennifer B.*, 189 Ariz. at 555, 944 P.2d at 70, we affirm the order.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge